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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Divakar Technologies, Inc.

File: B-402026

Date: December 2, 2009

Raj Divakar for the protester.

Yavuz Arik for SKY, LLC, an intervenor.

Michael I. Goulding, Esq., Department of Health and Human Services, for the agency.
Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest that agency improperly evaluated successful vendor under experience/past performance factor is denied where the agency reasonably considered the experience and past performance of the awardee's key personnel even though they had been employed by other firms at the time, and where the evaluation was otherwise reasonable and consistent with evaluation criteria in solicitation.

DECISION

Divakar Technologies, Inc., of Bethesda, Maryland, a small business, protests the award of a contract to SKY, LLC, of Rockville, Maryland, by the Department of Health and Human Services (HHS) under request for quotations (RFQ)

No. SAMHSA10356 for services to improve accessibility of the website of the Office of Applied Studies (OAS) within the Substance Abuse and Mental Health Services Administration (SAMHSA). Divakar argues that HHS miscalculated SKY under the RFQ's experience/past performance factor.

We deny the protest.

BACKGROUND

HHS issued the RFQ as a commercial item solicitation on August 24, 2009. The RFQ described the scope of work as reviewing the existing OAS web site, outlining potential short-term, long-term, and "sustainable" improvements, implementing the

improvements selected by SAMHSA, and thereafter maintaining the web site for the 1-year term of the contract. RFQ at 3. The RFQ was set aside for small businesses. RFQ at 1.

As originally issued, the RFQ sought fixed price quotations. Shortly thereafter, a vendor questioned the feasibility of proposing fixed prices on the basis that the RFQ did not provide sufficient information to assess the amount of work HHS expected the vendor to perform. In response, HHS amended the RFQ to provide for the award of a time-and-materials contract. RFP amend. 1, at 3 (Question 4 and Answer 4).

The RFQ advised vendors that quotations would be evaluated on the basis of three factors: experience/past performance, section 508,¹ and cost or price. RFQ amend. 1, at 32-33. The experience/past performance factor was to be evaluated qualitatively under five subfactors, which were weighted as shown:

1. Prior experience in organizing sophisticated and technical web-based information (publications, data tables, and other products) so that naïve users have quick and easy access to the desired information. (35 points)
2. Prior experience in taxonomy building and linking taxonomies to content materials with minimal effort on the part of users without unnecessary duplication. (25 points)
3. Prior experience in determining user requirements and relating those requirements to technical subject matter. (15 points)
4. Prior successful experience in importing outdated website contents and archival materials to a state-of-the-art web presence. (15 points)
5. Prior experience in working with a public health agency particularly with a focus on substance abuse and behavioral health. (10 points)

RFQ amend. 1, at 33.

¹ This aspect relates to ensuring that the website maximizes compliance with § 508 of the Rehabilitation Act of 1973, as amended, which generally requires agencies to procure electronic and information technology that allows individuals with disabilities to access and use technology that is comparable to that of persons without disabilities, unless doing so would impose an undue burden on the agency. See 29 U.S.C. § 794d (2006).

The section 508 factor was to be evaluated as acceptable or unacceptable, and the RFQ advised that offerors that were rated unacceptable would not be considered for award. The RFQ also provided that selection of the successful vendor would be based on a trade-off where experience/past performance was significantly more important than cost or price. RFQ amend. 1, at 33.

The RFQ advised vendors to submit their quotations in three volumes: experience and past performance information, Section 508 compliance, and cost. RFQ amend. 1, at 31-32.² The RFQ also identified an estimated level of effort, using three labor categories: senior web reviewer/designer, junior web reviewer, and administrative assistant. HHS also advised offerors that “[a]lternative labor mixes and levels of effort will be evaluated and may be appropriate as well.” RFQ amend. 1, at 6 (Answer to Question 15).

HHS received quotations from five firms, including Divakar and SKY. Both Divakar and SKY provided information on experience/past performance, ability to meet section 508 requirements, and cost. SKY’s proposed cost was \$114,420, while Divakar’s proposed cost was \$40,760.

The evaluators rated both Divakar and SKY acceptable under the section 508 factor. Under the experience/past performance factor, Divakar received a total of 48 points out of 100. The evaluators criticized Divakar’s experience/past performance information as being difficult to trace or match to the evaluation criteria, and disapproved of Divakar’s use of jargon. The evaluators assessed weaknesses under four of the five above-quoted subfactors because Divakar had not shown that its experience was sufficiently similar to the tasks required under the RFQ. Protest at 68-69 (E-mail from CO to Divakar, Sept. 30, 2009, at 2-3).

In contrast, the evaluators gave SKY all of the available points under the experience/past performance factor (100 points), and identified no weaknesses. Under each subfactor, the evaluators identified as strengths particular aspects of SKY’s experience that were similar to the requirements of the RFQ. For example, under the first—and most important—subfactor, experience in organizing sophisticated and technical web-based information for access by non-technical users, the evaluators noted that SKY

present[ed] several examples of prior work in which products similar to those of OAS (publications, data tables) were organized for ease of

² We note that the parties generally refer to the vendors as having submitted prices, even though the RFQ required quotations to propose a labor mix, level of effort, and hourly labor rates.

access. Of particular interest is the project for the World Bank for information [that] was organized in 5 languages.

Experience/Past Performance Evaluation of SKY, at 1.

On September 21, the contracting officer (CO) selected SKY's quotation for award, and then notified Divakar of the award the following day. On September 30, the CO sent an e-mail to Divakar to explain the agency's rationale for the award, pursuant to Federal Acquisition Regulation (FAR) § 13.106-3. Divakar filed this protest with our Office on October 1.

DISCUSSION

Divakar's initial protest stated that the award to SKY was improper because Divakar's proposed cost was significantly lower than SKY's proposed cost. Divakar also argued that SKY lacked the needed database experience because, in part, the firm's main activities were "energy consulting, selling 3-ring binders through [a website], and selling marketing material design services through [another website]." Protest at 2-3.

On October 6, HHS requested dismissal of the protest on the grounds that Divakar's claims were factually baseless. After our Office convened a conference call with the parties, and declined to dismiss the protest, counsel for HHS offered to provide to Divakar (with SKY's agreement) a copy of the experience/past performance section of SKY's proposal,³ and a copy of the corresponding page of HHS's evaluation. With this information, HHS sought to persuade Divakar to withdraw its protest. Instead, Divakar filed a supplemental protest.⁴

Divakar's supplemental protest argued that it was improper for HHS to credit SKY with the experience and past performance of SKY's key personnel at times when those individuals had been employed by other firms, or were assisted by other people, or when SKY was a subcontractor to another firm. Supplemental (Supp.) Protest at 2. Divakar also argued that SKY was not listed in the central contractor registry until 2009, and therefore could not claim experience before that time. Supp. Protest at 1, 3, 5. In addition, Divakar argued that SKY's proposal failed to include a

³ While we recognize that the agency requested, and vendors provided, quotations, these quotations essentially took the form of proposals.

⁴ Since it became apparent to our Office that we could resolve both the initial protest and the supplemental protest together, we did not open a supplemental protest file. This decision resolves both the initial protest and the supplemental protest.

resume for an administrative assistant, that HHS had been motivated by bad faith in selecting SKY over Divakar, and that HHS had provided Divakar with a defective debriefing.⁵ Supplemental (Supp.) Protest at 6-7.

On October 15, HHS filed materials that, in essence, constituted an agency report. On October 26, Divakar filed comments.

Divakar argues that SKY lacks experience and has no relevant past performance, because the firm's references were for work performed by SKY's key personnel, rather than by SKY itself as a business entity, or were for work performed by SKY as a subcontractor. Divakar argues that HHS therefore was required to find that SKY lacked relevant past performance, and was required to give SKY a neutral rating. Divakar Comments at 1. Divakar argues that if SKY had received a neutral rating for experience/past performance, the CO would have selected Divakar as the best value.

Where a solicitation calls for the evaluation of experience and past performance, we will examine the record to ensure that the evaluation was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations. MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 10. Nothing in the RFQ prohibited the agency from evaluating experience/past performance information where the vendor had been a subcontractor. See George G. Sharp, Inc., B-401077, B-401077.2, Apr. 15, 2009, 2009 CPD ¶ 87 at 5 (agency properly considered experience gained as a subcontractor). Likewise, in evaluating a firm's experience and past performance, it is proper for an agency to consider the experience of proposed key personnel. Id. Here, SKY's quotation showed that the firm's proposed key personnel had performed in key roles on contracts submitted as experience/past performance references. Therefore the evaluation record supports the evaluators' judgments that the experience of SKY's key personnel would be brought to bear in the firm's work for SAMHSA, and that SKY's experience/past performance was highly relevant to the work under the RFQ. In short, the evaluation of SKY's experience/past performance was reasonable in our view.

In summary, the contemporaneous evaluation record provides a reasonable basis for HHS to consider SKY's experience/past performance to be uniformly superior. The RFQ specified that experience/past performance was significantly more important

⁵ Although Divakar refers to the September 30 communication as a debriefing, as noted above, the communication itself states that it is an explanation of the basis for the award under FAR § 13.106-3(d), rather than a debriefing. This appears to be consistent with the synopsis, which described the accompanying RFQ as a commercial item simplified acquisition under Part 12.6 of the FAR. Synopsis at 1.

than cost, and therefore the CO reasonably justified the selection of SKY's higher-rated, higher-cost proposal over Divakar's.⁶

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁶ As noted above, Divakar raised additional arguments in the initial and supplemental protests, and HHS provided its responses in its October 15 submission. Divakar's comments then focused on whether SKY had relevant experience/past performance, and the effect of the allegedly improper evaluation on the source selection. Since Divakar abandoned the other issues, our decision does not address them. Citrus College; KEI Pearson, Inc., B-293543 et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4.